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No. 01-420

IN THE

Supreme Court of the United States

WILLIAM G. FLANIGAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILAR SITUATED, *et al.*,
Petitioners,

v.

GENERAL ELECTRIC CO., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT LOCKHEED MARTIN CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Lockheed Martin Corporation ("LM") had a fiduciary obligation under the Employee Retirement Income Security Act of 1974 ("ERISA") to disclose incompletely developed details about a future benefits plan to potential employees before the plan was adopted.

2. Whether LM violated the anti-cutback rules contained in ERISA and the Internal Revenue Code when it decided not to renew certain special benefit provisions that it had agreed to provide for a brief transition period, and instead allowed them to expire according to their terms.

3. Whether General Electric Company ("GE") violated ERISA's general fiduciary provisions when it transferred actuarial surplus funds in GE's defined benefit plan to the LM defined benefits plan.

RULE 29.6 STATEMENT

LM has no parent corporation, and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 242 F.3d 78. Pet. App. 1a-20a. The decision of the district court granting summary judgment to respondents is reported at 93 F. Supp. 2d 236. Pet. App. 21a-101a. The two earlier opinions of the district court granting in part respondents' motions to dismiss are unreported. Pet. App. 102-139a.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2001, and the petition for rehearing was denied on June 8, 2001.

The petition for certiorari was filed on September 6, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 3(7), 204(g), 404(a), and 406 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1002(7), 1054(g), 1104(a), and 1106 (1994), appear at Pet. App. 142a-147a.

Section 208 of ERISA provides in relevant part:

> A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan . . . unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately prior to the merger, consolidation, or transfer (if the plan had then terminated).

29 U.S.C. § 1058 (1994).

STATEMENT

1. This ERISA dispute arises out of what the district court described as "unique facts" surrounding a complex corporate acquisition. Pet. App. 82a. On November 22, 1992, LM and GE executed a transaction agreement under which LM would acquire GE's aerospace businesses. Pet. App. 34a, 103a. As part of the deal, LM agreed to offer employment to some 37,000 GE employees and to provide them with "substantially similar" employee benefits through the end of 1993. Pet. App. 3a. GE employees had until the day of the transaction's closing to accept LM's offer, or instead resign or retire from GE and remain participants under GE's pension plan. Pet. App. 9a. After several postponements, the transaction closed on April 3, 1993.

a. *Facts Relevant to Issue 1: Communication Claim.* Following the transaction agreement's execution, LM faced the formidable task of analyzing GE's more than 50 separate benefit plans and developing its own program with "substantially similar" benefits. Pet. App. 44a-45a. Given this task, LM resisted as premature efforts to disseminate a full benefits package that was still under development and subject to change. Pet. App. 44a-45a. Nonetheless, both it and GE made substantial benefit disclosures in the months leading up to the closing. Indeed, as early as December 1992, GE employees were assured that LM would provide benefits "essentially equal" to those at GE. Pet. App. 35a. Thereafter, through weekly updates, LM and GE provided GE employees accurate and substantial information about post-closing benefits as it was being developed. Pet. App. 9a-10a, 33a-46a.

Throughout this process, particular attention was paid to the pension benefits that LM would provide. For example, in January 1993, LM advised GE employees that the pension benefits they had earned under the GE plan would be fully protected under LM's new plan; that it was LM's objective on a prospective basis to provide regular pension benefits no less than those under GE's then current plan; and that two special benefit features under the GE plan—the Special Early Retirement Option ("SERO") and the Plant Closing Pension Option ("PCPO")—would be continued through June 1994, their expiration date under the GE plan. On February 19, 1993—some six weeks before the closing—LM notified GE employees that it would use GE's pension formula through June 1994. Pet. App. 10a-11a, 42a. And, on March 23, 1993, LM disseminated to GE employees a comprehensive description of *all* LM's 1993 plans and made clear that a majority of them, and, in particular, the pension plan, were identical to GE's. Pet. App. 9a-11a, 43a-45a.

b. *Facts Relevant to Issue 2: Anti-Cutback Claim.* Effective April 5, 1993, LM created the Martin Marietta

Pension Plan for Employees of Transferred GE Operations ("Trans Ops Plan"), that generally duplicated the pension benefits offered in GE's Plan. As promised, the Trans Ops Plan continued both the special SERO and PCPO benefits.

From their inception in GE's Plan, the SERO and PCPO benefits were the product of collective bargaining and subject to expiration dates that coincided with the bargaining agreement's term. While GE allegedly renewed these benefits periodically, it never made them a permanent plan feature. Rather, the GE plan always conditioned eligibility for these benefits upon retirement before a date certain, *i.e.*, their stated expiration dates. Pet. App. 104a. For example, the GE Handbook in effect at the time of the closing stated that "July 1, 1994 is the last day an eligible employee can retire with a SERO pension." *Id.* This same limitation applied to the PCPO benefit. *Id.*

Consistent with its representations to GE's employees, LM continued these benefits in the Trans Op Plan, but only for their then remaining life under the GE plan, *i.e.*, it specifically limited eligibility to employees who retired prior to July 1, 1994. LM briefly extended the expiration date for these benefits until January 1, 1995 while it was in the process of completing a new benefit program. However, LM chose not to extend the date further and let the benefits expire according to their terms on January 1, 1995, with the consequence that any employee who retired after that date would not receive these benefits.[1] Pet. App. 105a, 118a.

c. *Facts Relevant to Issue 3: Asset Transfer Claim.* The GE plan is a defined benefit plan. Participants in such plans are guaranteed a fixed level of benefits upon retirement regardless of the plan's investment success or failure. The

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[1] The expiration of these benefits had no impact on employees who had met the terms and conditions for them, including retirement, prior to their expiration.

investment risk at all times rested squarely on GE, which was obligated to fund the promised benefits.[2] The GE plan, based on its actuarial assumptions, was "overfunded" at the time of the transaction, *i.e.*, the value of the plan's assets exceeded the actuarially determined value of the plan's liabilities.

In connection with the transaction's closing, the GE plan transferred the accrued pension liability of the employees who accepted LM's offer to the new LM Plan. Pet. App. 123a. There also was a trust-to-trust transfer of a defined amount of pension assets from the GE Plan to the LM Plan. The transaction agreement contemplated that this transfer would include a portion of the "actuarial surplus." However, the agreement made clear that, at a minimum, the transferred amount could not be less than that necessary to satisfy the provisions of ERISA and the Internal Revenue Code that govern the transfer of pension assets and liabilities from one plan to another. *See* ERISA § 208, 29 U.S.C. § 1058; 26 U.S.C. § 414(*l*). This assured that the LM plan would receive assets at least equal to the accrued pension liabilities transferred to it.

2. In the district court, petitioners pressed a multitude of claims. After denying a preliminary injunction motion, the district court dismissed some of petitioners' claims on two separate Rule 12(b)(6) motions. Pet. App. 102a-139a.

In pertinent part, the district court rejected petitioners' claim that LM violated anti-cutback rules of ERISA and the Internal Revenue Code when it let the PCPO and SERO benefit features expire. Pet. App. 118a-120a. The court emphasized that the benefits had not been terminated

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[2] *See generally Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999) ("the employer typically bears the entire investment risk and—short of the consequences of a plan termination—must cover any underfunding as the result of a shortfall that may occur from the plan's investments").

prematurely by amendment, but rather ended in accordance with their own terms. Pet. App. 120a. The court also resolved petitioners' fiduciary and prohibited transaction challenges to GE's transfer of actuarial surplus funds to the LM Plan. Pet. App. 131a-135a. The court found that GE's transfer fully complied with ERISA § 208, which governed the issue. *Id.* In doing so, the court observed there was "no dispute that sufficient funds were transferred to satisfy such accrued obligations." Pet. App. 123a.

The district court then conditionally certified two plaintiff subclasses to pursue the remaining claims: Subclass One, included all former GE employees who had retired or resigned from GE between the announcement and closing of the deal, and Subclass Two, comprised of former GE employees who went to work at LM. Pet. App. 5a, 23a. Subclass One pursued the claim that respondents failed to provide timely and accurate information about post-closing benefits (the communications claim). *Id.* Subclass Two members pursued claims that are not before this Court. *Id.*

After extensive discovery, the court granted summary judgment for respondents on petitioners' remaining claims. Pet. App. 21a-101a. With respect to the communications claim, the district court found that LM owed no fiduciary duty to the Subclass One members who, by definition, never became its employees. Pet. App. 68a-72a. The court further found that GE did not breach a fiduciary duty owed to them because it "had no control over the benefits that [LM] would provide." Pet. App. 79a. To the extent that plaintiffs were caught in "a Catch-22" situation, the court stated that "any unfairness . . . [was] minimized by the unique facts of this case." Pet. App. 81a-82a. In particular, the court observed that "the information that plaintiffs claim should have been disclosed was provided *prior to* the time any employment or retirement decisions had to be made by GE employees." Pet. App. 83a (emphasis added).

3. The court of appeals affirmed. Pet. App. 1a-20a. The court first rejected petitioners' communications claim, on grounds somewhat different than the district court. Pet. App. 8a-12a. The court suggested that, "had there been a plan in effect," LM might have owed Subclass One members a fiduciary obligation to communicate information about that plan. Pet. App. 12a. However, the court found that petitioners' complaints related to the disclosure of "what were at best internal deliberations" about plan details *before* the plan was adopted. *Id.* The court ruled that prior to the plan's adoption, LM had no disclosure obligation because it was not then an ERISA fiduciary. Pet. App. 11a.

The court likewise ruled that GE did not breach a fiduciary duty. Pet. App. 8a-10a. The court found that GE's "serious communications efforts . . . easily fulfilled any pertinent obligation on [its] part." Pet. App. 9a-10a. According to the court, there was "no evidence" that GE withheld material information or purposefully misled petitioners concerning LM's benefits. Pet. App. 10a. In the alternative, the court agreed with the district court that LM and GE disseminated timely and accurate information about the successor plans before the affected GE employees had to make final employment decisions. Pet. App. 11a.

The court further rejected the argument that GE violated a fiduciary duty when it transferred actuarial surplus in GE's defined benefit plan to the LM plan. Pet. App. 16a-20a. The court found that ERISA's fiduciary obligations were not triggered by the transfer of plan surplus, citing as support "recent Supreme Court case law" and "at least four circuit courts of appeals." Pet. App. 17a-18a. The court emphasized that GE complied with ERISA § 208's mandate and that "plaintiffs ended up receiving everything to which they were entitled," which was a transfer of "all accrued benefits . . . to the LM plan." Pet. App. 19a.

The court also summarily affirmed the district court's remaining rulings, including that LM did not violate anti-cutback rules when it let the special benefit provisions—SERO and PCPO—expire. Pet. App. 20a.

ARGUMENT

The opinion of the court of appeals is unanimous, and turns on the unique facts surrounding what the court characterized as a "bewilderingly complex transaction." Pet. App. 3a. The court's fact-bound decision raises no issue warranting this Court's review, and does not conflict with the decisions of this Court or another court of appeals. Review by this Court is therefore not warranted.[3]

I. THE OPINION BELOW RAISES NO CONFLICT ON THE SCOPE OF AN ERISA FIDUCIARY'S OBLIGATIONS TO PROVIDE INFORMATION TO PLAN PARTICIPANTS.

The court below correctly determined that in the particular circumstances of this case LM owed no fiduciary obligation "to disclose what were at best internal deliberations" about a plan that had not yet been adopted. Pet. App. 12a. That fact-bound conclusion, contrary to petitioners' arguments, does not conflict with the decisions of other courts.

1. Petitioners principally contend (Pet. 16-17) that review is warranted because the Second Circuit's decision conflicts with this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). In *Varity*, the employer intentionally lied to its *own* employees to induce them to transfer to a newly formed subsidiary which it knew was insolvent, in order to avoid claims for termination pay and substantial obligations for retiree welfare benefits. *Id.* at 491-93, 506. This Court found

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[3] Since it was issued over nine months ago, the decision has not been cited outside the Second Circuit.

the employer was acting as an ERISA fiduciary when it urged its employees to give up their rights as participants in the existing plan and that its deliberate misstatements were actionable as breaches of fiduciary duty. *Id.* at 503, 506.

Varity is easily distinguishable and simply does not speak to the basis for the Second Circuit's conclusion that LM did not breach any fiduciary duty to the GE employees (*i.e.*, that LM had no obligation to discuss with prospective employees its own non-final deliberations about a plan not yet adopted). The Second Circuit concluded that the party in the position of the *Varity* employer—GE—owed fiduciary disclosure duties to its *own* employees—the Subclass One members—and that it did not breach those fiduciary duties. Specifically, the court of appeals found that there was "*no evidence* that GE withheld material information concerning Lockheed's benefits, or that GE purposefully misled the plaintiffs in any way." Pet. App. 10a (emphasis added). As for LM, the court found that it too did not breach any fiduciary duty to GE's employees, because it refused only to divulge incompletely developed information about the successor plans *before* it was actually adopted. Pet. App. 12a. There is thus no conflict between this case and *Varity* and nothing in *Varity* calls into question the propriety of the Second Circuit's conclusions.

Indeed, petitioners' argument illustrates precisely what is wrong with their claim. LM resisted efforts to prematurely release information about pending corporate ideas that had not reached maturity for the very reason that it did not want to mislead GE employees. Pet. App. 44a-45a. Precipitous disclosure of plan details still in the works and subject to change would have actually impaired the ability of GE employees to make a sound decision regarding retirement or future employment. *See Pocchia v. Nynex Corp.*, 81 F.3d 275, 278 (2d Cir.) ("Until a plan is adopted, there is no plan, simply the possibility of one. Insisting on voluntary disclosure during the formation of a plan and prior to its adoption would, we think, increase the likelihood of

confusion on the part of beneficiaries . . . ."), *cert. denied*, 519 U.S. 931 (1996); *accord Bins v. Exxon Co.* 220 F.3d 1042 (9th Cir. 2000) (*en banc*).

In any event, the lower courts unanimously found as a *fact* that respondents made timely disclosure concerning LM's new benefit programs, including its new pension plan. Pet. App. 10a-11a, 83a. As the district court noted, on February 19, 1993, respondents notified GE employees that their pensions—"the central element of their benefits"—would be calculated at LM under the identical formula used by GE. Pet. App. at 82a. Moreover, on March 23, 1993, LM made full disclosure of its complete benefit package. Pet. App. 11a, 83a. Thus, the district court concluded that "the information that plaintiffs claim should have been disclosed was provided prior to the time any employment or retirement decisions had to be made by GE employees." Pet. App. 83a.

The court of appeals agreed: "All this information was provided prior to the time that any final decision or retirement decisions had to be made by GE employees. *We regard this as timely*." Pet. App. 11a (emphasis added). That fact-bound determination, which petitioners do not address or dispute, is dispositive here and makes further review unwarranted.[4]

2. Petitioners next argue (Pet. 17) that the decision below perpetuates a circuit conflict as to "whether ERISA fiduciary protections apply to employees who, as a result of the fiduciary violations, never become participants in the new

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[4] Of course, in challenging the timeliness of these disclosures on fiduciary grounds, petitioners ignore ERISA's express statutory provisions governing both the content and timing of benefit disclosures. *See* ERISA § 104(b)(1)(A), 29 U.S.C. § 1024(b)(1)(A) (requiring plan administrator to furnish summary plan description to each participant and beneficiary within 90 days after an employee becomes a participant or a beneficiary begins receiving benefits). Petitioners have never suggested that respondents failed to comply with these express statutory requirements.

plan." But even if petitioners were correct that a circuit conflict exists, this case is not within that circuit conflict.

Every case cited by petitioners on this point dealt with the issue of standing. *See* Pet. 17, citing *McBride v. PLM Int'l, Inc.*, 179 F.3d 737, 743-44 (9th Cir. 1998); *Shea v. Esensten*, 107 F.3d 625, 628 (8th Cir. 1997); *Swinney v. General Motors Corp.*, 46 F.3d 512, 518-19 (6th Cir. 1995); *Vartanian v. Monsanto Co.*, 14 F.3d 697, 702 (1st Cir. 1994); *Christopher v. Mobile Oil Corp.*, 950 F.2d 1209, 1220-23 (5th Cir. 1992). However, the court of appeals' decision did not rest on standing grounds; indeed, it did not address that issue at all. Rather, the court below held that LM could not be found to have violated ERISA's fiduciary requirements because its plan was only subject to internal deliberations and had not yet been adopted.

In any event, none of the cases cited by petitioners involves potential or prospective employees, such as the Subclass One members. As the district court pointed out, petitioners "have not directed the Court toward, nor has the Court been able to locate, any cases where fiduciary duties attached to communications by a potential or future employer." Pet. App. 70a. Rather, then, as now, every case cited by petitioners (including *Varity*), involved individuals who were participants in their own employer's benefit plan *at the time of the alleged misconduct*, but then later lost that participant status. *See* Pet. 17; *see also Varity*, 516 U.S. at 493-94 (involving Varity employees who transferred to the newly formed company in reliance upon Varity representatives). These cases do not hold that *prospective* employees can somehow be "participants" in the prospective employer's plans and, accordingly, do not conflict with the court of appeals' decision in this case.[5]

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[5] *Cf. Coleman v. General Elec. Co.*, 643 F. Supp. 1229, 1234 (E.D. Tenn. 1986) (rejecting fiduciary disclosure claim against GE, the

3. Finally, petitioners are wrong to contend (Pet. 18) that the court of appeals adopted an overly restrictive reading of the statutory term "participant." In fact, the court of appeals did the opposite. By its terms, ERISA's definition of "participant" includes "*any employee or former employee of an employer*," 29 U.S.C. § 1002(7) (emphasis added). It does not encompass potential employees. However, the court of appeals in dictum stated that "*potential* employees," such as Subclass One members, could be "participants." Pet. App. 11a-12a (emphasis added). It then rejected petitioners' communications claim against LM because LM could not be a fiduciary when there was no "plan in effect." Pet. App. 12a. Thus, this case simply does not present the issue petitioners would have this Court address.

II. THE RULING BELOW DOES NOT CREATE A CIRCUIT CONFLICT ON THE SCOPE OF THE ANTI-CUT BACK RULES.

1. Petitioners next contend (Pet. 19-23) that the Second Circuit's ruling on the elimination of the special SERO and PCPO benefits creates a circuit conflict on the scope of the anti-cutback rules contained in ERISA and the Internal Revenue Code. Those rules prohibit the elimination or reduction of certain accrued pension benefits *by plan amendment*. *See* ERISA § 204(g), 29 U.S.C. § 1054(g); 26 U.S.C. § 411(d)(6) (1984) (emphasis added). Even apart from the fact that the district court correctly ruled that those provisions were not implicated where, as here, the benefits in questions simply expired in accordance with their terms (Pet. App. at 120a), this issue does not merit this Court's attention.

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purchaser in a corporate transaction, since "GE . . . had no fiduciary duty under the strict terms of the statute to the plaintiffs" who were employees of the *seller* company at the relevant time), *aff'd per curiam*, 822 F.2d 59 (6th Cir. 1987).

As a threshold matter, the Second Circuit affirmed without comment this aspect of the district court's ruling. Pet. App. 20a. Its ruling therefore does not establish circuit precedent on the issue. For that reason alone, the anti-cut back issue is unsuited for further review.

Moreover, contrary to the petitioners' contention, the district court's ruling does not conflict with *Bellas v. CBS, Inc.*, 221 F.3d 517 (3d Cir. 2000), *cert. denied*, 531 U.S. 1104 (2001), or *Harms v. Cavenham Forest Indust., Inc.*, 984 F.2d 686, 690-92 (5th Cir.), *cert. denied*, 510 U.S. 944 (1993). Unlike here, the special benefits in *Harms* did not lapse by their terms, but were prematurely terminated by amendment. In that case, the employer agreed to provide special retirement benefits for a two-year period following a change of corporate control. However, the successor company amended the retirement plan to eliminate the special benefits *before* the specified two-year protection period had expired. The court of appeals concluded that the employer violated the anti-cutback rules by terminating the program prior to its stated expiration date by plan amendment. 984 F.2d at 692-93.

Bellas also is not to the contrary, and indeed, supports the decisions below. At issue in *Bellas* were two plan amendments, which first narrowed eligibility for and then eliminated certain special early retirement benefits. The court held that these amendments violated the anti-cut back rules with respect to certain of these benefits, none of which were conditioned upon retirement before a specified date or otherwise had a self-contained expiration date. 221 F.3d at 532-33.

The *Bellas* court, however, concluded that these amendments did *not* violate the anti-cutback rules in eliminating a supplemental pension benefit which, like SERO and PCPO, was specifically conditioned upon retirement prior to a specified date which had passed. The court found that Bellas

had "no protected right" in the supplemental benefit because he could not satisfy the condition imposed by the original plan for the benefit's receipt, "namely, that he retire on or before September 1, 1994." 221 F.3d at 536 n.17. In short, in *Bellas*, as here, the plaintiffs could never satisfy an express condition of eligibility (*i.e.*, retirement before a certain date), and therefore could not "grow into" the benefit after its expiration. Thus, even apart from the fact that it involved plan amendments not present here, *Bellas* is consistent with the decisions below.

2. Petitioners also claim (Pet. 20-21) that the lower court's ruling violates Revenue Ruling 92-66 of the Internal Revenue Service. This highly fact-specific issue, which was not addressed by *either* court below, does not merit this Court's attention.

As an initial matter, the Revenue Ruling is inapposite to the case at hand. It addressed a situation in which the employer had offered a substantially similar early retirement "window" benefit for four years in succession. A window benefit is typically an early retirement benefit that is available only for a limited time to employees who elect to retire. The PCPO and SERO, by contrast, were unpredictable contingent event benefits; they are available only to employees who lose their jobs as a result of particular events such as a plant closing or layoff. The IRS regulations draw a clear distinction between window benefits and unpredictable contingent event benefits. *See* Treas. Reg. §§ 1.401(a)(4)-4(d)(3), (7).

In any event, the factual nature of this issue makes it particularly inappropriate for review by this Court. The Revenue Ruling itself makes clear that the issue turns on whether participants have a "reasonable expectation" that the benefits will be continued under the particular "facts and circumstances" presented. While petitioners allege that PCPO and SERO had become a "regular feature" of the LM plan, the fact remains that LM did not engage in any conduct that

could have created any such expectation on the petitioners' part. To the contrary, LM advised affected GE employees prior to the closing that, as a transitional matter, it would continue these benefits but only for their then remaining life under the GE plan, *i.e*, for retirements prior to July 1, 1994. That LM then briefly extended these benefits for an additional six month period while it completed a new benefit program could not give rise to any "reasonable expectation" that they would be continued in perpetuity. Given these facts and the unique corporate acquisition context in which they arose, this case simply does not present an appropriate vehicle for addressing the issue petitioners seek to pose.

Finally, the issue simply is not one of general importance warranting this Court's attention. Not only is there no circuit conflict concerning the application of this Revenue Ruling 92-66, but research indicates that it has been cited only *once* in a published opinion, and then only at the district court level. *See DeCarlo v. Rochester Carpenters Pension, Annuity, Welfare & S.U.B. Funds*, 823 F. Supp. 115, 119-20 (W.D.N.Y. 1993). And in that case, the court found that Revenue Ruling 92-66 did not support plaintiff's argument that the limited duration benefits were protected by the anti-cutback rules.

III. THE TRANSFER OF SURPLUS PLAN ASSETS FROM THE GE PLAN TO THE NEW LM PLAN WAS NOT A BREACH OF FIDUCIARY DUTY OR A PROHIBITED TRANSACTION UNDER ERISA.

Finally, petitioners argue (Pet. 22-28) that GE violated ERISA's general fiduciary duties, including its prohibited transaction rules, by transferring some of the GE Plan's actuarial surplus to the LM Plan. Petitioners claim that, in making the transfer, GE unlawfully "garnered and kept the consideration [LM] paid for these assets." Pet. App. 22.

The court of appeals rejected petitioners' argument, holding that ERISA fiduciary duties were not triggered by GE's decision to transfer some of the GE Plan's actuarial surplus to the LM Plan. The court reasoned that the asset transfer decision at issue "was, at its core, a corporate business decision," which GE made "as a settlor, not a fiduciary." Pet. App. 18a.

That ruling fully comports with prior decisions of this Court and other circuits. In *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999), this Court held that "an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties." *Id.* at 443-44. The Court ruled similarly in *Lockheed Corp. v. Spink*, 517 U.S. 882, 891 (1996), that an employer does not act as an ERISA fiduciary when it establishes, modifies or terminates a pension plan.

Likewise, as the court below noted, there is no disagreement in the circuits on this issue. At least four circuits have indicated that an employer does not act as a fiduciary in deciding to transfer pension assets and liabilities to another plan. *See* Pet. App. 17a, citing *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 719 (6th Cir. 2000); *Ames v. Am. Nat'l Can Co.*, 170 F.3d 751, 757 (7th Cir. 1999); *Sys. Council EM-3 v. AT&T Corp.*, 159 F.3d 1376, 1379 (D.C. Cir. 1998); *Blaw Knox Retirement Income Plan v. White Consol. Indus., Inc.*, 998 F.2d 1185, 1189 (3d Cir. 1993). No other circuit has reached a different conclusion.

Contrary to petitioners' contention (Pet. 23), the court of appeals' decision does not insulate pension asset transfers from ERISA scrutiny, much less "oust[] ERISA jurisdiction" over such transfers. As the court of appeals recognized, GE's pension asset transfer was governed by the specific ERISA provision applicable to such transfers, ERISA § 208—*not* by

ERISA's fiduciary responsibility provisions.[6] Pet. App. 19a. Petitioners do not dispute that GE's pension asset transfer fully complied with Section 208. Pet. App. 19a, 62a. Nor is there any question that "plaintiffs ended up receiving everything to which they were entitled." Pet. App. 19a.

Furthermore, there is no basis for petitioners' repeated contention (Pet. 22, 25, 27, 28) that the pension asset transfer involved a "conversion" of plan assets by GE. Pension assets from the GE Plan were transferred directly to the LM Plan—no pension assets (surplus or otherwise) were transferred to GE. Pet. App. 16a; *id.* at 133a ("there is no allegation in the present case that GE transferred any of the residual assets to itself"). Nor has there been any "use" of the transferred assets by GE. As the court of appeals found, "all of the pension surplus that GE transferred to LM was used to fund pension benefits." Pet. App. 18a (citing *Hughes Aircraft*, 525 U.S. at 442). Any incidental benefit to GE is indistinguishable from the benefit that GE would have realized had the actuarial surplus been retained in the GE plan. *See Hughes Aircraft*, 525 U.S. at 440 ("if the defined benefit plan is overfunded, the employer may reduce or suspend his contributions"); Pet. App. 134a (noting that any such surplus "cushion" could be "spent down and eroded by an employer over time").

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[6] Indeed, as this case indicates, any contrary rule would subject employers to constant second guessing as to the amount of the transfer. While petitioners contend here that GE violated ERISA's fiduciary standards by transferring any actuarial surplus in the GE plan to the new LM plan (*i.e*, that it transferred "too much"), they also contended in their initial complaint that the failure to transfer the full amount of any actuarial surplus attributable to former GE participants violated ERISA (*i.e*, that GE transferred "too little"). Pet. App. 131a. The contradictory nature of these claims only underscores that so long as Section 208 is satisfied, the amount of a transfer is a settlor function.

Petitioners nevertheless insist (Pet. 19) that the decision below sets up a conflict "in the lower courts"—although they cite only two district court opinions, *Coleman v. Pension Benefit Guaranty Corp.*, 94 F. Supp.2d 18 (D.D.C. 2000), and *In Re Gulf Pension Plan Litigation*, 764 F. Supp. 1149 (S.D. Tex. 1991). This Court, of course, does not ordinarily grant review to resolve conflicts among district courts. *See* Supreme Court Rule 10(a). There is no reason to do so here given that *Coleman* did not involve a transfer of pension assets from one plan to another, and the decision in *In Re Gulf Pension Plan* was issued prior to this Court's controlling decisions in *Hughes* and *Spink*.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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